

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

CIVIL ACTION NO.

05-30031-KPN

BERKSHIRE HEALTHCARE SYSTEMS,)
INC.,)

Plaintiff,)

vs.)

ROYAL & SUN ALLIANCE,)

Defendant.)

FILED
U.S. DISTRICT COURT
DISTRICT OF MASS.
JAN 31 A 10:02

NOTICE OF REMOVAL

NOW COMES the Defendant, Royal & Sun Alliance incorrectly named herein the correct defendant being Security Insurance Company of Hartford ("Defendant"), and hereby notices the removal of the following described action from the Superior Court of Berkshire County, Commonwealth of Massachusetts (the "State Court"), to the United States District Court for the District of Massachusetts, Springfield Division (the "District Court"), as authorized by 28 U.S.C.A. §1441, et seq., and would show to the Court that the grounds for removal are as follows:

I.

Plaintiff, Berkshire Healthcare Systems, Inc. ("BHCS" or "Plaintiff"), filed a Complaint for Declaratory Judgment against Defendant on or about December 17, 2004, in a suit styled Berkshire Healthcare Systems, Inc. v. Royal & Sun Alliance, in the Superior Court of Berkshire

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To
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V.

The captioned District Court sits in the district and division embracing the place where the State Court Action is pending.

VI.

The District Court has jurisdiction over this action arising out of diversity jurisdiction. Plaintiff is a Massachusetts corporation with a principal place of business in the State of Massachusetts. The Complaint alleges that Defendant, Royal & Sun Alliance, is a North Carolina corporation with a principal place of business in North Carolina. Royal & Sun Alliance is not a corporate entity but rather is a trade name; hence Royal & Sun Alliance has no place of incorporation. As indicated above, the Defendant has been incorrectly named herein as Royal & Sun Alliance, the true defendant being Security Insurance Company of Hartford, the entity that actually issued the Policy. Security Insurance Company of Hartford is a Connecticut corporation with a principal place of business in North Carolina. The amount in controversy, in the event Plaintiff were to prevail on its claims, exceeds \$75,000.00 exclusive of interest and costs.

VII.

Pursuant to 28 U.S.C.A. §1332, United States District Courts have original jurisdiction over all civil actions where the amount in controversy exceeds the sum or value of \$75,000.00 exclusive of interest and costs, and the action involves a dispute between citizens of different states. Therefore, the District Court has original jurisdiction over this matter under 28 U.S.C.A. § 1332, and this action may be removed from the State Court to the District Court pursuant to 28 U.S.C.A. §1441 (a) and (b).

VIII.

Defendant is the only defendant named in the Complaint and is therefore the only defendant that has made an appearance in this matter.

IX.

A list of all counsel of record is attached as Exhibit "B". An index of all matters being filed herewith is attached as Exhibit "C".

X.

Defendant appears herein by and through its attorneys specifically and solely for the purpose of removing the State Court Action to the District Court.

XI.

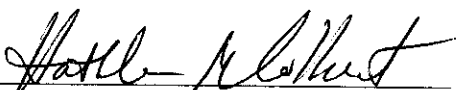
Promptly after filing this Notice of Removal of the State Court Action, Defendant will give written notice of such filing to Plaintiff, and will file a copy of the Notice of Removal with the clerk of the State Court, which shall effect removal of the State Court Action, and the State Court Action shall proceed no further unless and until the case is remanded.

WHEREFORE, Defendant prays that this Notice of Removal be accepted as good and sufficient, that the aforesaid Complaint be removed from State Court to the District Court for trial and determination as provided by law, and that the District Court enter such orders and issue such process as may be proper to bring before it copies of all records and proceedings in said

State Court Action, and thereupon proceed with this civil action as if it had originally been commenced in the District Court.

SO NOTICED this 28th day of January, 2005.


Defendant,
Respectfully submitted by its attorneys,


George C. Rockas, BBO#544009
Kathleen M. Colbert, BBO#561174
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
155 Federal Street
Boston, Massachusetts 02110
(617) 422-5300

CERTIFICATE OF SERVICE

I, Kathleen M. Colbert, hereby certify that on this 28th day of January, 2005, I served a copy of the foregoing document by first class, postage prepaid mail upon the following counsel of record:

Lucy Prashker BBO# 405580
CAIN HIBBARD MYERS & COOK, PC
309 Main Street
Great Barrington, MA 01230
(413) 528-4771
(413) 528-6973 (facsimile)


Kathleen M. Colbert

COMMONWEALTH OF MASSACHUSETTS

Berkshire, ss.

**Superior Court
Civil Action No.**

**BERKSHIRE HEALTHCARE SYSTEMS,
INC.,**

Plaintiff,

v.

ROYAL & SUN ALLIANCE,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT

PARTIES

1. Berkshire Healthcare Systems, Inc. ("BHCS") is a not-for-profit Massachusetts corporation with a principal place of business at 75 North Street, Pittsfield, Massachusetts.

2. Royal & Sun Alliance ("Royal") is a North Carolina corporation with a principal place of business at 9300 Arrowpoint Boulevard, Charlotte, North Carolina.

JURISDICTION

3. This Court has jurisdiction of this matter under M.G.L. c. 223A, §3 and M.G.L. c. 231A.

PRELIMINARY STATEMENT

4. BHCS seeks a judgment, under M.G.L. c. 231A, declaring its contractual rights under its Workers' Compensation and Employers' Liability Insurance Policy (the "Policy") issued by Royal for the January 1, 2001 to January 1, 2002 policy period (the "Policy Period"). The premiums payable by BHCS under that Policy are calculated

according to a retrospective rating plan and are subject to a \$250,000 loss limitation for each claim made. Royal failed to apply that loss limitation in calculating the third retrospective premium adjustment under the Policy. As a result of that failure, Royal's third retrospective premium adjustment overstates the appropriate premium adjustment by \$200,625. BHCS seeks an order declaring that the third retrospective premium adjustment be reduced by that amount in accordance with the loss limitation. BHCS also seeks an order requiring Royal to provide adequate assurances of ability to perform its future obligations under the Policy prior to BHCS's being required to make any additional retrospective premium payments based upon estimated future losses under the Policy.

The Retrospective Rating Plan

5. BHCS purchased a Workers' Compensation and Employers' Liability Insurance Policy from Royal effective January 1, 2001.

6. BHCS elected to enroll in Royal's "Retrospective Rating Plan" for the calculation of premiums. Under that Retrospective Rating Plan, a "Retrospective Premium" was to be periodically adjusted based in part on actual and estimated losses relating to the Policy Period.

BHCS's Election of a Loss Limitation

7. An endorsement to the Policy provides that the policy holder may elect a "Loss Limitation" described as follows:

The election of a loss limitation means that the amount of incurred loss to be included in the retrospective premium is limited to an amount called the loss limitation. The loss limitation applies separately to each person who sustains bodily injury by disease and separately to all bodily injury arising out of any one accident.

8. BHCS duly elected the application of a loss limitation of "\$250,000" under the Policy.

Retrospective Premium Adjustment Made Without Loss Limitation

9. In accordance with the Policy, Royal made its first retrospective premium adjustment in June 2002, valuing the losses (both actual and estimated) for that period at \$870,006, resulting in a decrease in the Retrospective Premium by \$18,713.

10. Royal made a second retrospective premium adjustment for the Policy Period in June 2003, valuing the losses (again, both actual and estimated) for that period at \$979,115, resulting in an increase in the Retrospective Premium of \$128,489.

11. Royal made a third retrospective adjustment for the Policy Period in June 2004, valuing the losses (again, both actual and estimated) at \$1,302,959, resulting in an alleged (but disputed) increase in the Retrospective Premium of \$381,365.

12. The third retrospective adjustment included an adjustment made for a single claim valued at \$420,365.

13. That claim should have triggered the application of the \$250,000 loss limitation; Royal, however, failed to apply the loss limitation to that claim in violation of the terms of the Policy.

14. Had Royal correctly applied the \$250,000 loss limitation, the third retrospective premium adjustment would have been \$200,625 lower, equaling \$180,740, rather than \$381,365.

Royal's Financial Distress

15. Upon information and belief, Royal is in financial distress and is either insolvent or nearing insolvency.

16. BHCS has received no adequate assurances that any additional premiums that it may pay to Royal to cover future estimated claims relating to the Policy Period will, in fact, be available to pay those claims in accordance with Royal's contractual obligations under the Policy.

17. Absent such assurances of future performance, BHCS should not be required to pay substantial retrospective premium adjustments to the extent based on Royal's estimates of future losses.

WHEREFORE, BHCS requests that the Court enter judgment:

1. Declaring that the \$250,000 loss limitation applies to the Policy for the Policy Period;
2. Declaring that any retrospective premium adjustment for the Policy Period be reduced by \$200,625 in accordance with the loss limitation;
3. Ordering Royal to provide adequate assurances of future coverage of estimated claims;
4. Declaring that BHCS is not required to pay any additional premiums to Royal for the Policy Period absent such adequate assurances; and
5. Awarding costs and such other relief as the Court deems just and appropriate.

Respectfully submitted,

BERKSHIRE HEALTHCARE
SYSTEMS, INC.,
Plaintiff

By its attorney,

Lucy Prashker (BBO# 405580)
CAIN HIBBARD MYERS &
COOK, PC
Attorney for the Plaintiff
309 Main Street
Great Barrington, MA 01230
(413) 528-4771
(413) 528-6973 (fax)

Dated: December 17, 2004

LIST OF COUNSEL OF RECORD

For the Plaintiff

Lucy Prashker BBO# 405580
CAIN HIBBARD MYERS & COOK, PC
309 Main Street
Great Barrington, MA 01230
(413) 528-4771
(413) 528-6973 (facsimile)

For the Defendant

George C. Rockas, BBO#544009
Kathleen M. Colbert, BBO#561174
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
155 Federal Street
Boston, Massachusetts 02110
(617) 422-5300
(617) 423-6917

EXHIBIT C
MATTERS FILED WITH NOTICE OF REMOVAL

1. Notice of Removal
2. Plaintiff's Complaint for Declaratory Judgment
3. List of All Counsel of Record

JS 44
(Rev. 3/99)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Berkshire Health Systems, Inc.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Berkshire
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

Royal & Sun Alliance incorrectly
named herein the correct defendant
being Security Insurance Company
of Hartford

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Lucy Prashker, Esq. BBO#405580
CAIN HIBBARD MYERS & COOK, PC
309 Main St, Great Barrington, MA 01230

ATTORNEYS (IF KNOWN)

George C. Rockas, Esq., BBO#544009
Kathleen M. Colbert, Esq., BBO#544009
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER
155 Federal St. Boston, MA 02110

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☐ 3 Federal Question (U.S. Government Not a Party)
☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (For Diversity Cases Only)

(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | | | | |
|----------------------------|----------------------------|---|----------------------------|----------------------------|
| PTF | DEF | | PTF | DEF |
| <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Citizen of This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Citizen of Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Citizen or Subject of a Foreign Country | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |
- Incorporated or Principal Place of Business in This State
Incorporated and Principal Place of Business in Another State
Foreign Nation

IV. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input checked="" type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Deceased Student Loans (Ecol. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veterans' Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury — Med. Malpractice <input type="checkbox"/> 365 Personal Injury — Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 750 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 153 <input type="checkbox"/> 423 Writ/Order 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 891 SSA (1365d) <input type="checkbox"/> 892 Black Lung (922) <input type="checkbox"/> 893 DMV/CJWW (405(g)) <input type="checkbox"/> 894 SSDI Title XVI <input type="checkbox"/> 895 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS — Third Party 28 USC 7622	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commercial/CC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 510 Selective Service <input type="checkbox"/> 530 Securities/Commodities/Exchanges <input type="checkbox"/> 575 Customer Challenge 12 USC 5410 <input type="checkbox"/> 591 Agricultural Acts <input type="checkbox"/> 592 Economic Stabilization Act <input type="checkbox"/> 593 Environmental Matters <input type="checkbox"/> 594 Energy Allocation Act <input type="checkbox"/> 595 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determined in Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 990 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 310 Land Condemnation <input type="checkbox"/> 320 Foreclosure <input type="checkbox"/> 330 Rent Lease & Ejectment <input type="checkbox"/> 340 Torts to Land <input type="checkbox"/> 345 Tort Product Liability <input type="checkbox"/> 390 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence HABEAS CORPUS: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 Original Proceeding
☒ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

28 U.S.C.A. sec. 1441 and 1332 Declaratory Judgment action declaring retrospective premium adjustment.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION
☐ UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ YES ☐ NO

VIII. RELATED CASE(S) (See instructions): IF ANY

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

1-28-05

FOR OFFICE USE ONLY

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. Title of case (name of first party on each side only) Berkshire Health Systems, Inc. v. Royal & Sun Alliance incorrectly named herein the correct defendant being Security Insurance Company of Hartford
2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).
- I. 160, 410, 470, R.23, REGARDLESS OF NATURE OF SUIT.
- II. 195, 368, 400, 440, 441-444, 540, 550, 555, 625, 710, 720, 730, 740, 790, 791, 820*, 830*, 840*, 850, 890, 892-894, 895, 950. *Also complete AO 120 or AO 121 for patent, trademark or copyright cases
- X III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371, 380, 385, 450, 891.
- IV. 220, 422, 423, 430, 460, 510, 530, 610, 620, 630, 640, 650, 660, 690, 810, 861-865, 870, 871, 875, 900.
- V. 150, 152, 153.
3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.
-
4. Has a prior action between the same parties and based on the same claim ever been filed in this court?
- YES ☐ NO ☒
5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)
- YES ☐ NO ☒
- If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?
- YES ☐ NO ☒
6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?
- YES ☐ NO ☒
7. Do all of the parties in this action, excluding governmental agencies of the united states and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).
- YES ☐ NO ☒
- A. If yes, in which division do all of the non-governmental parties reside?
- Eastern Division ☐ Central Division ☐ Western Division ☐
- B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?
- Eastern Division ☐ Central Division ☐ Western Division ☒
8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)
- YES ☐ NO ☐
- (PLEASE TYPE OR PRINT)
- ATTORNEY'S NAME Kathleen M. Colbert
- ADDRESS Wilson, Elser, Moskowitz, Edelman & Dicker LLP
- 155 Federal Street, Boston, MA 02110
- TELEPHONE NO. (617) 422-5300